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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
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10/667,206

09/22/2003

David Ternes

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7158

21186

7590

08/07/2008

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EXAMINER

EVANISKO, GEORGE ROBERT

ART UNIT

PAPER NUMBER

3762

MAIL DATE

DELIVERY MODE

08/07/2008

PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Office Action Summary	Application No. 10/667,206	Applicant(s) TERNES, DAVID	
	Examiner George R. Evanisko	Art Unit 3762	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 22 May 2008.
- 2a) ☐ This action is **FINAL**. 2b) ☒ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 38-80 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 38-80 is/are rejected.
- 7) ☐ Claim(s) _____ is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
 2. ☐ Certified copies of the priority documents have been received in Application No. _____.
 3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- | | |
|----------------------------------------------------------------------------------------|-------------------------------------------------------------------|
| 1) <input checked="" type="checkbox"/> Notice of References Cited (PTO-892) | 4) <input type="checkbox"/> Interview Summary (PTO-413) |
| 2) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | Paper No(s)/Mail Date. _____ |
| 3) <input checked="" type="checkbox"/> Information Disclosure Statement(s) (PTO/SB/08) | 5) <input type="checkbox"/> Notice of Informal Patent Application |
| Paper No(s)/Mail Date <u>5/22/08</u> . | 6) <input type="checkbox"/> Other: _____ |

DETAILED ACTION

Continued Examination Under 37 CFR 1.114

A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on 5/22/08 has been entered.

Claim Rejections - 35 USC § 112

The following is a quotation of the second paragraph of 35 U.S.C. 112:

The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the applicant regards as his invention.

Claims 38-80 are rejected under 35 U.S.C. 112, second paragraph, as being indefinite for failing to particularly point out and distinctly claim the subject matter which applicant regards as the invention.

In claim 38, line 3, "from physiological data obtained" is vague and inferentially included. It is unclear if the applicant is positively reciting the data and a structure to obtain it or functionally reciting the data. In line 4, "data" is vague. Is this the same data used in line 3. If it is the same data, "the data" should be used. In line 6, "a displayed summary" is vague and inferentially included. It is unclear what element is providing/producing the summary. In line 7, "automatically extracted" is vague and makes the claim incomplete for omitting an element to extract the indicator.

Claim 42 and 76 are vague and conflicts with claims 38/72 since claims 38/72 has the system automatically starting the episode while claims 42/76 has a non-automatic start.

In claim 72, “from physiological data obtained” is vague and inferentially included. In line 4, “data” is vague. In line 7, “automatically extracted” is vague.

Claim Rejections - 35 USC § 102

The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

A person shall be entitled to a patent unless –

(e) the invention was described in (1) an application for patent, published under section 122(b), by another filed in the United States before the invention by the applicant for patent or (2) a patent granted on an application for patent by another filed in the United States before the invention by the applicant for patent, except that an international application filed under the treaty defined in section 351(a) shall have the effects for purposes of this subsection of an application filed in the United States only if the international application designated the United States and was published under Article 21(2) of such treaty in the English language.

Claims 38, 41, 42, 70, 72, 75, and 76 are rejected under 35 U.S.C. 102(e) as being anticipated by Kroll et al (7177684). Kroll discloses the use of automatically beginning and ending an exercise episode based on activity data (e.g. col 3, line 11, col. 13) to provide an automatic display of the prognostic indicator (e.g. col. 4, figure 9c). NOTE that the data displayed is a prognostic "indicator" as it predicts an event or indicates something is about to happen and that it is up to the physician to determine what these indicators mean. The claim does not state that the patient condition is determined and displayed based on the indicator.

Claim Rejections - 35 USC § 103

The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

(a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negated by the manner in which the invention was made.

Claims 38, 40, 41, 42, 50-56, 62, 64, 65, 68, 69, 71, 72, 74, 75, and 76 are rejected under 35 U.S.C. 102(b) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Tsuda (5980464). Tsuda discloses that the system starts and stops the exercise period based on movement of the pedals. The movement of the pedals is a sensing/data of physiological data since it is a function and activity of life or living matter (the movement of the patient, exercising of the patient). In addition, Tsuda discloses the display for displaying the summary of the exercise episode (e.g. col. 17, line 25, figure 9). NOTE that the data displayed is a prognostic "indicator" as it predicts an event or indicates something is about to happen and that it is up to the physician to determine what these indicators mean. The claim does not state that the patient condition is determined and displayed based on the indicator.

In the alternative, Tsuda discloses the claimed invention except for the processor using physiological data to automatically identify the beginning and end of the exercise episode. It would have been obvious to one having ordinary skill in the art at the time the invention was made to include in the system and method as taught by Tsuda the processor using physiological data to automatically identify the beginning and end of the exercise episode since it was known in the art that medical systems use a processor using physiological data to automatically identify the beginning and end of the exercise episode to provide the predictable results of acquiring data from the patient using an automated system that does not require user intervention and is based on the patients actual functions and activities.

Claims 43, 44, 45, 63, 77, 78, and 79 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tsuda in view of Gamlyn et al (5749367). Please see the previous office action of 2/22/08 for this rejection.

Claims 39, 49, 57-61, 67, 70, 73, and 80 are rejected under 35 U.S.C. 103(a) as being unpatentable over Tsuda. Please see the previous office action of 2/22/08 for this rejection.

Allowable Subject Matter

Claims 46-48 would be allowable if rewritten to overcome the rejection(s) under 35 U.S.C. 112, 2nd paragraph, set forth in this Office action and to include all of the limitations of the base claim and any intervening claims.

Response to Arguments

Applicant's arguments with respect to the claims have been considered but are moot in view of the new ground(s) of rejection necessitated by amendment.

Conclusion

Any inquiry concerning this communication or earlier communications from the examiner should be directed to George R. Evanisko whose telephone number is 571 272 4945. The examiner can normally be reached on M-F 6:30-5:00.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Angela Sykes can be reached on 571 272 4955. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/George R Evanisko/
Primary Examiner, Art Unit 3762

GRE
8/3/08